MEDICAL BOARD OF CALIFORNIA
INITIAL STATEMENT OF REASONS

Hearing Date:
November 7, 2003

Subject Matter of Proposed Regulations:
Public Information Disclosure of Multiple Malpractice Settlements:

1. Definition of Medical Specialties at high risk of multiple settlements
2. Formula for determining if settlement will be disclosed as "Average," "Below Average," or "Above Average."

Section Affected:
Adoption of Section 1353.31 in Article 1 of Chapter 2 of Division 13, Title 16 California Code of Regulations

Specific Purpose of each adoption, amendment, or repeal:
The purpose of the proposed regulation is to comply with Business & Professions Code Section 803.1. (Created as a result of the passage of SB1950 (Figueroa; Chapter 1085; Statutes of 2002)). In summary, the Board must now provide the public with certain limited information about multiple malpractice settlements. The law further places certain restrictions on what and how this information may be disclosed.

For physicians who practice in a "low risk" specialty, only those physicians with three or more settlements over a period of 10 years (beginning on January 1, 2003) will have this information disclosed on their licensing record. Physicians in a "high risk" specialty will only have malpractice information disclosed if they have four or more. The actual amount of the settlements will not be disclosed; instead, the Board must disclose them by category of "below average," "average," and "above average."

These regulations will define the high and low risk specialties, as well as set the formula for determining whether settlements are "below average," "average," or "above average."

Factual Basis:
B& P Code Section 803.1 mandates the Board adopt regulations relating to the disclosure of multiple malpractice settlements of physician and surgeons --- to establish high and low risk medical specialties and set a formula to determine in what category malpractice settlements fall and, therefore, how they will be reported to the public.

The law requires that the regulations be based on information from the malpractice carriers and further required the Board to hold public meetings with the insurers and specialty societies. To comply with this mandate, the Board contacted all of the major medical malpractice carriers and medical societies. (See sample letter and list of

recipients and agenda; Exhibits 1, 2 and 3.) On February 26, staff held its first public meeting with the legally mandated organizations and those parties interested in the implementation of the legislation. While invitations were sent to all major malpractice carriers and all the major specialty societies, attendance was modest. Only one malpractice carrier sent representation, and a handful of specialty societies were represented. The CMA and Senator Liz Figueroa's staff participated in the meeting. (See April 14, 2003 memo from Ron Joseph, Executive Director, Medical Board of California, to Division of Medical Quality Members, and Memorandum dated July 11, 2003 from Janie Cordray to Members of Division of Medical Quality; Exhibits 4 and 5.)

From the discussions at the meeting, there are practical and logistical problems associated with using malpractice carrier data, even though the carriers were willing to provide the data in their possession to the Medical Board. While the malpractice carriers have certain actuarial criteria on which they base premiums, the way that they are categorized, coded, and classed are different from company to company. Different companies recognized different specialties, sub-specialties and super-sub-specialties. Region is taken into account, which considers that a physician in one region may be at higher risk of lawsuit than those in other regions. "Below average," "average," and "above average" settlement amounts also are subject to regional differences. The CMA representative at the meeting agreed that she would work with the carriers to compile the data for the Board.

By July 1, the Board had not received any material from the malpractice carriers or the CMA. Board staff conducted an analysis of the malpractice settlement data it had received over the past ten years as a result of the requirement of B&P Code Section 800. That analysis concluded that there was no specialty at particularly high risk for multiple settlements, however, some specialties were at higher risk than other. (See "Underlying Data" and Follow-up –up to July 11, 2003 Memorandum – Data compiled relating to physician malpractice settlements in the past 10 years; Exhibit 6.)

On July 31, only one day prior to the DMQ meeting at which this subject was to be discussed as agenda item # 11, the Board received a document from the CMA as a result of the information provided to them from the major malpractice carriers. (See Memo from Sandra Bressler, CMA representative, to Ron Joseph, Executive Director of the Medical Board; Exhibit 7.) This document summarizes the specialties categorized by the malpractice carriers as high risk, but, it appears to be based on actuarial data relating to the setting of premiums based on risk of lawsuit and high pay-out, rather than for risk of multiple settlement activity, as their categorization of the specialties is not substantiated by the data in the settlement reports received, under mandate of law, by the Medical Board over the past 10 years.

On August 1, 2003, the members of the Board's Division of Medical Quality reviewed the data prepared (Exhibit 6), and concluded that, based on the actual data in the possession of the Medical Board, it would move forward with the rulemaking process,

propose regulations that would assign the “high risk” categories to neurosurgeons, orthopedic surgeons, and plastic surgeons, and schedule a regulatory hearing for their next regularly scheduled meeting on November 7, 2003. In addition to the specialty risk categories, the proposed regulation should contain the mathematical formula that will be used for reporting settlements, which is as follows:

The mean of the total reports from January 1 to date will be calculated. Based on that number, the categories will be figured as follows:

Below Average: 17% and below the mean
Average: less than 17% above and below the mean
Above Average: 17% and above the mean

This formula was simply determined as follows: the cumulative total of 100% of settlements was broken into thirds. "Below average" represents the bottom third (0% to 33%) of all settlements, “average" represents the middle third (34% to 66%) of all settlements, and “above average" represents the upper third (67% to 100%) of all settlement.

Underlying Data:

The data relied upon in developing this regulation is derived from reports received from the malpractice carriers over more than 10 years. (See Exhibit 6.) These reports are mandated by Business & Professions Code Section 800. The data revealed that no specialty is particularly at high risk for multiple settlement, but some are at higher risk than others. Those specialties have been identified in the proposed regulations to comply with the mandates of Business & Professions Code Section 803.1.

Until the passage of SB 1950 (Figueroa; Chapter 1085; Statutes of 2002), the reports received on malpractice settlements did not reflect the specialty certification or specialty practice of the physician. For that reason, other sources of data were relied upon to obtain that information. The American Board of Medical Specialties (ABMS) database of statistical information on number of specialists certified in California, the ABMS database to determine specialty certification of individual doctors, and the American Medical Association database on physicians were accessed. In addition, the Board’s Enforcement and Investigation files were accessed to determine the nature of the malpractice suit to determine how it should be categorized.

Business Impact:

__x__ This regulation will not have a significant adverse economic impact on businesses.

_____ Description of alternatives which would lessen any significant adverse impact on business:

Specific Technologies or Equipment:

__x__ This regulation does not mandate the use of specific technologies or equipment.

_____ This regulation mandates the use of specific technologies or equipment. Such mandates or prescriptive standards are required for the following reasons:

Consideration of Alternatives:

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

The only alternative to this proposed regulation would be not to comply with Business & Professions Code Section 803.1, which would place the Medical Board of California in violation of law.

PLEASE NOTE: All of the exhibits referenced in this document are available by contacting the Contact Person or by visiting the Web site as directed in the Notice. The cumulative exhibits are approximately 30 pages in length.